Lim Choon Ghee v Sharizan bin Md Isa

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPLICATION NO K-08-315 OF 1995
NH CHAN, MAHADEV SHANKAR AND VC GEORGE JJCA
10 JULY 1995

Civil Procedure *— Appeal — Leave to appeal — Application made out of time — No good reasons were shown as to why the delay had occurred — Whether leave should be granted*

The plaintiff was involved in a road accident with the defendant. On 16 April 1995, the High Court judge dismissed the action. The value of the subject matter was below RM200,000 and therefore leave to appeal was required to bring the matter in the Court of Appeal. The plaintiff filed a motion for leave to appeal from the decision of the High Court and contingent upon such leave being granted for an extension of time to file the notice of appeal, memorandum of appeal and the appeal record. The motion and the affidavit in support was only filed in the Court of Appeal Registry on 24 May 1995. The defendant objected the application on the grounds, inter alia, that: (i) the plaintiff was out of time; and (ii) in any case there was no affidavit explaining why the delay had occurred.

Held, dismissing the application:

(1) The rules are quite clear that any such application must be made within the period limited for the filing of an appeal. Therefore, the application should have been filed on or before 15 May 1995. When the plaintiff received the original and service copies of the notice of motion, it should have been apparent to him on or about 24 May 1995 that he was already too late and had some explaining to do. In any case, when he received the defendant's affidavit opposing their application, he should have come to court with convincing reasons why he should be exculpated. No good reasons were shown as to why the delay had occurred. There was no merit in the request of the applicant to be given time to file an affidavit in reply to the defendant's affidavit. All the grounds furnished by the defendant opposing the motion were valid (see pp 567F–G and 568C–E).

(2) Had this application been made in time, the result would have been the same. The court was satisfied that this was a case where the plaintiff was driving too fast and also following too close to the van in front of him with which he collided. The issue here was a pure question of fact and the presumption was that the plaintiff had only himself to blame. This presumption was borne out completely by the police report and the sketch plan (see p 568F–G).

Obiter:
Solicitors should have become perfectly aware of the unreliability of courier services who are handed documents in order to expedite delivery but instead, particularly when it comes to filing court documents, they seem to take much longer than the due course of post. In all such cases, it is for the solicitors to make sure that the documents have reached the Registry in time (see p 568H).

[Bahasa Malaysia summary

Plaintif terlibat dalam kemalangan jalan raya dengan defendan. Pada 16 April 1995, hakim Mahkamah Tinggi menolak tindakan. Nilai perkara subjek kurang daripada RM200,000 dan maka kebenaran merayu dikehendaki untuk mengemukakan hal ini di Mahkamah Rayuan. Plaintif memfailkan satu usul untuk kebenaran merayu daripada keputusan Mahkamah Tinggi dan bergantung pada kelulusan kebenaran demikian untuk perlanjutan masa memfailkan notis rayuan, memorandum rayuan dan rekod rayuan. Usul dan afidavit menyokong hanya difailkan di Pejabat Pendaftaran Mahkamah Rayuan pada 24 Mei 1995. Defendan membantah terhadap permohonan atas alasan, antara lain, bahawa: (i) plaintif adalah 'di luar masa'; dan (ii) walau bagaimanapun tiada afidavit yang menjelaskan mengapa kelewatan berlaku.

Diputuskan, menolak permohonan:

(1) Kaedah-kaedah adalah agak jelas bahawa sebarang permohonan demikian mestilah dibuat dalam tempoh yang dihadkan untuk pemfailan suatu rayuan. Maka, permohonan sepatutnya difailkan pada atau sebelum 15 Mei 1995. Apabila plaintif menerima salinan asal dan salinan penyampaian notis usul, ia sepatutnya jelas kepadanya pada atau sekitar 24 Mei 1995 bahawa dia telah terlambat dan hendaklah memberi penjelasan. Walau bagaimanapun, apabila dia menerima afidavit defendan yang menentang permohonan mereka, dia sepatutnya telah menghadiri mahkamah dengan alasan yang meyakinkan mengapa dia patut dibebaskan. Tiada alasan yang kukuh ditunjukkan tentang mengapa kelewatan berlaku. Tiada merit dalam permintaan pemohon supaya diberikan masa untuk memfailkan suatu afidavit jawapan kepada afidavit defendan. Segala alasan yang dibentangkan oleh defendan menentang usul adalah sah (lihat ms 567F–G dan 568C–E).

(2) Andainya permohonan ini telah dibuat menepati masa, keputusannya tetap sama. Mahkamah berpuas hati bahawa ini merupakan kes di mana plaintif memandu terlalu laju dan juga mengikut van di hadapannya dengan terlalu rapat hinggakan berlanggaran dengannya. Isu di sini adalah persoalan fakta semata-mata dan anggapan adalah bahawa plaintif sendiri patut dipersalahkan. Anggapan ini dibuktikan sepenuhnya oleh laporan polis dan pelan lakaran (lihat ms 568F–G).

Obiter:

Peguamcara sepatutnya sedar akan ketidakbolehpercayaan perkhidmatan kourier yang diserahkan dokumen supaya penghantaran dipercepatkan tetapi sebaliknya, khususnya apabila ia berkenaan pemfailan dokumen mahkamah, mereka seolah-olah mengambil masa yang lebih lama daripada melalui pos. Dalam semua kes begini, peguamcara haruslah memastikan bahawa dokumen-dokumen sampai di Pejabat Pendaftaran menepati masa (lihat ms 568H).]

Notes

For cases on leave to appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 478–506 and 508.

Appeal from: Suit No 23–30 of 1992 (High Court, Alor Setar)

G Ravishankar (*NM Tiong & Co*) for the appellant.
Joga Singh (*VP Nathan & Partners*) for the respondent.

Mahadev Shankar JCA (delivering judgment of the court): This is a motion for leave to appeal from a decision of the High Court and contingent upon such leave being granted for an extension of time to file the notice of appeal, memorandum of appeal and the appeal record.

The matter concerned a road accident on 4 December 1990. The plaintiff was a motorcyclist who had collided with the back of a van going in the same direction along Jalan Pegawai in Alor Setar towards Jalan Kuala Kedah.

On 16 April 1995, the case was heard. The High Court judge dismissed the action with costs. The value of the subject matter was below RM200,000 and therefore leave to appeal would have been required in order to bring the matter in the Court of Appeal.

The rules are quite clear that any such application must be made within the period limited for the filing of an appeal. In other words, the application should have been filed on or before 15 May 1995.

The plaintiff's solicitors affirmed an affidavit on 27 April 1995 and the same day settled the notice of motion.

For reasons not made clear to us, this motion and the affidavit in support were only filed in the Court of Appeal Registry on 24 May 1995. Proof of this is furnished by the praecipe stamp which appears on the office copy of the notis usul.

Evidently the plaintiff's solicitors had not given any prior indication to the defendant's solicitors that they were contemplating an appeal. They served the notice of motion and the affidavit in support on the defendant's solicitors only on 26 June 1995.

The motion had by then been fixed for disposal on 10 July 1995.

On 6 July 1995, the defendant's solicitors filed an affidavit affirmed by the defendant in Penang on 5 of July 1995. This affidavit made clear that the defendant's solicitors were resisting the application on the grounds:

(i) that when the notis usul reached the Registry on 24 May 1995, the plaintiff was sadly out of time; A

(ii) that the application for leave contained in the motion was misconceived because the proper application in the circumstances was one for an extension of time to file the application for leave itself;

(iii) that such an application would have to be supported by an affidavit showing good reasons why the application had not been made in due time; and B

(iv) in any case there was no affidavit before the court explaining why the delay had occurred.

At this juncture we should point out that when the plaintiff's solicitors received the original and service copies of the notice of motion, it should have been apparent to them on or about 24 May 1995 that they were already too late and had some explaining to do. In any case, when they received the defendant's affidavit opposing their application, they should have got their act together and come to court with convincing reasons why they should be exculpated. C D

The situation that we were faced with on 10 July when the matter came up in open court was that no good reasons were shown as to why the delay had occurred.

We did not see any merit in the request of the applicant to be given time to file an affidavit in reply to the defendant's affidavit. E

All the grounds furnished by the defendant opposing the motion were valid and we upheld them and dismissed the application with costs.

We should add that had this application been made in time, the result would have been the same. Attached to the defendant's affidavit are the police report and sketch plan. We are satisfied that this was a case where the plaintiff was driving too fast and also following too close to the van in front of him with which he collided when that van moved towards the centre of the road in order to turn right into Jalan Taman Selamat. The issue here was a pure question of fact and the presumption is that the plaintiff had only himself to blame. This presumption was borne out completely by the police report and the sketch plan. F G

Since July 1995, solicitors should have become perfectly aware of the unreliability of courier services who are handed documents in order to expedite delivery but instead, particularly when it comes to filing court documents, they seem to take much longer than the due course of post. In all such cases, it is for the solicitors to make sure that the documents have reached the Registry in time. H

Our decision in this matter was unanimous and the reasons given above represent the views of all three of us that the application should be dismissed. I

Application dismissed.

Reported by Jafisah Jaafar